IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-768

KENNETH O. GASPER, ET AL.,
Petitioners,

versus

LOUISIANA STADIUM AND
EXPOSITION DISTRICT, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACOB J. MEYER
OF COUNSEL:
Coleman, Dutrey, Thomson,
Meyer & Jurisich
321 St. Charles Avenue
Tenth Floor Suite
New Orleans, Louisiana 70130
Telephone: (504) 586-1979
ATTORNEYS FOR PETITIONER

SCOFIELDS' QUALITY PRINTERS, P. O. BOX 53096, N. O., LA. 70153 · 504/822-1611

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

No.

KENNETH O. GASPER, ET AL.,
Petitioners

versus

LOUISIANA STADIUM AND
EXPOSITION DISTRICT, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

The petitioners, Kenneth O. Gasper, et al, pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 577 F.2d 897, and is reprinted in the Appendix hereto, p. 1a infra. The opinion of the District Court for the

Eastern District of Louisiana is reported at 418 F.Supp. 716 and is reprinted in the Appendix, pp. 11a-27a, infra (hereinafter referred to as "App.")

JURISDICTION

The judgment of the Court of Appeals was rendered on August 1, 1978 (App. pp. 1a-9a). A timely Petition for Rehearing and suggestion for Rehearing En Banc was denied on September 14, 1978. (App. pp. 10a-11a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The basis of jurisdiction in the District Court was 42 U.S.C. §1983 and 28 U.S.C. §1343(3).

QUESTIONS PRESENTED

As to the Certiorari Policy: The issues presented in this petition are de novo. This Court writes on a clean slate. Its importance in terms of national health and preventive medicine are, we believe, far reaching and profound. Its importance in terms of determining the question of what constitutes the full extent of "liberty" under the Fifth Amendment to the United States Constitution is also of paramount significance. The full meaning and intent of the Ninth Amendment is also significantly at issue. The lower Courts' failure to involve themselves in this new area of national concern, coupled with the fact that two prominent commentators in environmental journals have viewed the District Court below's decision as being contrary to a decision of this Court in *Pollak v. Public Utilities Commission of the District of Columbia*, 89 U.S. App. D.C. 94, 191 F.2d 450 (1951), reversed, 343 U.S. 451, 72

S.Ct. 813, 96 L.Ed. 1068 (1952) make it imperative that this Honorable Court issue a writ of certiorari to review all of the constitutional issues raised in this new but important case. The lower Courts' have shown a fundamental reluctance to involve themselves in the far reaching constitutional issues presented in this case. The lower Courts' in this case have also shown a basic misunderstanding of the allegations contained in the plaintiffs' complaints and have confused the plaintiffs' claims that they have the right to breathe smoke-free air in an indoor State operated facility as being equated to an attempt to enforce prohibition on smokers in general. The lower Court's basic misconceptions of the plaintiff's claims, the extent to which they claim that forced inhalation of tobacco smoke is dangerous to health, and the extent to which the District Court and the Court of Appeals have refused to involve themselves in this important issue also lends to the importance of this case. This is not the type of case to be decided on barebone pleadings alone. It should be decided on the basis of evidence assayed within the constitutional arguments set forth by petitioners in their complaint. Should not this Court resolve this most fundamental issue of physical rights, namely: does a person have a right under the Bill of Rights in general and the First, Fifth, Ninth and Fourteenth Amendments in particular to be free from the forced inhalation of hazardous tobacco smoke in a state operated facility such as the Louisiana Superdome? This issue is worthy of this Court's review.

On the Merits: The main thrust of the District Court below's opinion, affirmed by the Court of Appeals, is that "the process of weighing one individuals' right to

be left alone, as opposed to other individuals' alleged rights under the Fifth and Fourteenth Amendments is better left to the processes of the legislative branches of Government". See District Court opinion at App. p. 21a, infra. The District Court below, as well as the Court of Appeals, showed a fundamental reluctance to involve itself in the smoking controversy notwithstanding the serious constitutional issues raised in the plaintiffs' complaint. Ever since the Surgeon General's report of 1964 linking cigarette smoking with cancer and other serious killer diseases, there has been a growing awareness that second hand smoke or smoke which non-smokers are compelled to inhale by reasons of proximity to the smoker, is also a serious health hazard. This has now become well documented and established by learned investigators and has been reported in such prestigious journals as the New England Journal of Medicine, among others. See "Effect of Passive Smoking on Angina Pectoris," Aronow, W.S., New England Journal of Medicine 299: 21-24 (July 6), 1978. It has now been scientifically established that by reason of proximity and poorly ventilated enclosures, non-smokers are subjected to serious and permanent health hazards by reasons of being forced to inhale tobacco smoke against their will. The question presented here is: Does an individual have the constitutional right to be free from the involuntary inhalation of hazardous tobacco smoke in a public facility? Since the District Court dismissed the plaintiff's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, all of the allegations, arguments and inferences to be drawn from the plaintiffs' allegations and arguments must be accepted as true. The plaintiffs have alleged and argued, inter alia, that tobacco smoke is dangerous to health; that smoking in the Superdome interferes with the plaintiffs' rights of self-preservation; to be let alone; to be free from injury and to be free from the exposure to and involuntary consumption of hazardous smoke fumes, all of which rights, privileges and immunities are guaranteed and secured to them by the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. In their request for oral argument in their Brief to the United States Fifth Circuit Court of Appeals, petitioners herein stated:

> "The constitutional issues raised in this Appeal are of the highest magnitude. They concern the most basic and fundamental rights that any government can confer upon the governed: the right to life itself, the right of bodily integrity; the right to be let alone, the right of self-preservation; the right to be free from injury. Without the fullest protection of these rights, all other rights, privileges and immunities secured to the people by the Constitution become meaningless."

In the petitioners' statement of the case in their Brief to the Court of Appeals, they stated:

> "Plaintiffs contend that under the Constitutional Amendments cited above, they have the right to be let alone; the right of privacy; the right to be free from the unnecessary exposure to life threatening and disease-causing gases and fumes in a public facility; the right to be free from injury in a public facility."

INTRODUCTORY STATEMENT

Prior to 1972, it was widely believed among the public that smoking was the smoker's problem. However, in 1972 the American College of Chest Physicians issued a statement that cigarette smoke is "harmful to the health of the individual who does not smoke but who inhales the hazardous constituents in the air produced by the smoker" (Quoted in Editorial, "Putting the Smoker in his Place — Alone", Modern Medicine, December 25, 1972, p. 72.). Since then, the World Health Organization and the World Conference on Smoking and Health have recognized that smoking may be harmful to non-smokers and have recommended restrictions on smoking in public places. See World Health Organization Technical Report Series No. 568, pp. 16, 28. World Health Organization, Geneva (1975) and New York Times, June 6, 1975, p. 36, Column 1.

In addition, the World Health Organization noted that pregnant cigarette smokers affect the health not only of those within the vicinity of their tobacco smoke but also of their expected children. World Health Organization Technical Report Series No. 568, p. 15. World Health Organization, Geneva (1975).

A 1970 survey of the United States Department of Health, Education and Welfare, found that 58.6% of the persons surveyed agreed with the statement "It is annoying to be near a person who is smoking cigarettes." U.S. Department of Health Education and Welfare, Pub. No. (HSM) 73-8727, "Adults Use of Tobacco — 1970" June, 1973, II-21. By 1976, the percentage of persons who agreed with the statement had increased to 62.7%. U.S. Department of Health Education and Welfare, "Adult Use of Tobacco — 1975", 1976, II-17. According to one survey of a group of adults, second hand tobacco smoke was the fourth most frequently named annoyance in their daily lives. Cameron P., "Second-Hand Tobacco Smoke: Children's Reactions", J. School Health 42:280-284 at 283 (1972). Quoting Cameron P., et al., "Urban Americas Most Common Annoyances", Paper delivered at Rocky Mtn., Psych. Ass'n Convention, Denver, May 12, 1971.

Second hand tobacco smoke is not a harmless annoyance. Tobacco smoke contains about 2,000 identifiable components. The following sixteen compounds, found in tobacco smoke, and thought to be the most dangerous to passive smokers, are listed in the order of "risk-priority": acrolein, carbon monoxide, nicotine, ammonia, formic acid, hydrogen cynaide, nitrous oxides, formaldehyde, phenol, acetaldehyde, hydrogen disulfide, pyridine, methyl chloride, acetronitrile, propionaldehyde and methanol. See Orlien, N., "Passive Smoking, Which Compounds Contribute to the Potential Health Hazards of Passive Smoking?" J. Norwegian Med. Ass'n. 31:2300-2303, 2318, (Eng. Abstr.), 1973.

(We note in passing, that in the New York Times of December 13, 1972, p. 59, Col. 3, Chief Justice Berger of this Honorable Court, while traveling on the Metroliner to New York City, complained about cigar smoke, and Amtrack restricted cigar smoking to the coach class smoking areas. It was George Bernard Shaw who once remarked that "Smokers and non-

smokers cannot be equally free in the same railway carriage").

One of the most deadly gases emitted by burning tobacco smoke is carbon monoxide. This is the colorless, odorless and tasteless gas best known to the public as the automobile emission responsible for the deaths of so many people who leave their car motors running in unventilated garages. This gas is absorbed by the passive smoker to a greater degree than any other compounds in tobacco smoke because of its high affinity to the red blood cells or hemoglobin; hemoglobin combined with carbon monoxide (carboxyhemoglobin) cannot then perform the function of hemoglobin, i.e., transporting oxygen throughout the body. This results in the starvation of the vital organs of our bodies such as the heart, the brain and the lungs of vital life-giving and life-sustaining oxygen. Sustained depravation of the proper function of hemoglobin will cause cellular death and ultimately death of the entire body.

It is within this context of the serious health hazards posed to the general public, and the majority of the general public's reaction to being forced to inhale tobacco smoke against its will, that this case arises. It involves non-smokers who are forced to inhale dense tobacco smoke in the poorly ventilated, completely enclosed Louisiana Superdome in New Orleans, Louisiana. Even when one sits next to a smoker in a ventilated room, the air around the seat contains 90 ppms (parts per million) of carbon monoxide. See "The Health Consequences of Smoking, a Report of the Surgeon General (1972)", U.S. Dept. of Health,

Education and Welfare, 123. In fact it has been discovered that cigarette smoke contains one million times more particulates and one hundred thousand times more benzopyrene, a carcinogen, than polluted air. Hoffmann, D. "Benzo[a]pyrene in Polluted Air", Preventative Medicine 1:450-451, 1972.

Thus, it is imperative that this Honorable Court issue a writ of certiorari to review the far reaching health questions involved in this Appeal and the question of whether or not an individual has a constitutional right in a public facility (within an artificially controlled environment) not to be exposed to such easily preventable and regulated health hazards.

It is stressed that plaintiffs in this action do not have as their goal prohibition of tobacco smoking. Undersigned counsel would be among the first to defend the rights of a cigarette smoker who is faced with a generalized law that would attempt to prohibit altogether smoking of tobacco products. This suit does not concern itself with prohibition. It concerns itself with the regulation of smoking tobacco in a particular public facility under artificially controlled conditions. The regulation of tobacco smoking in the Superdome is no more related to the danger of prohibition anymore than is the regulation of traffic related to the prohibition of automobiles. This distinction was missed and misapplied by the District Court and the Court of Appeals.

In Louisiana, it is politically unrealistic to expect Legislative action on the issue in this case. Both the State and local legislative branches of Government have rejected non-smoking laws. The Tobacco Lobby is too powerful. It is an unequal contest.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

> "Congress shall make no law . . . abridging the freedom of speech, . . ."

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of . . . liberty . . . without due process of law; . . ."

The Ninth Amendment to the Constitution of the United States provides as follows:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

42 U.S.C. §1983 provides as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

28 U.S.C. §1343(3), provides in pertinent part as follows:

> "The District Courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . ."

STATEMENT OF THE CASE

This action is brought by the petitioners to enjoin the Louisiana Stadium and Exposition District (LSED) and its Board of Commissioners from permitting smoking in the Louisiana Superdome during the staging therein of public events. LSED, is an agency of the State of Louisiana. The Louisiana Superdome is a public building operated by LSED.

Specifically, plaintiffs set out in their complaint and their amended complaints that smoking in the Super-

dome violates their constitutional rights under the First, Fifth, Ninth, and Fourteenth Amendments to the Constitution.

Petitioners contend that under the Constitutional Amendments cited above, they have the right to be let alone; the right of privacy; the right of liberty; the right to be free from the unnecessary exposure to life-threatening tobacco smoke in a public facility; the right to be free from injury in a public facility; the right to receive information and ideas in a public facility unfettered by the dangerous pre-condition that they involuntarily inhale tobacco smoke; and the right of bodily integrity.

The Louisiana Superdome is a multi-purpose, fully enclosed structure located in the Central Business District of New Orleans, that was designed, inter alia, to accommodate sporting events, entertainment, cultural activities, conventions and trade shows. It opened to the public on August 3, 1975 and since that time, has accommodated millions of patrons.

The gravamen of petitioners' complaint and the conclusions reasonably to be drawn therefrom, is that tobacco smoke is a clear and present danger to their health and bodily integrity — not merely a tolerable inconvenience or minor discomfort; and that all of the above constitutional rights emanate from and exist within the penumbra of specific guarantees of basic fundamental rights of the Bill of Rights.

The types of health hazards complained of by the petitioners relate not merely to minor irritations, inconveniences and annoyances caused by the forced inhalation of tobacco smoke but rather to such catastrophic and life-threatening illnesses as cardiovascular disease, cancer, stroke, emphysema and chronic bronchitis.

Petitioners contend that tobacco smoking is associated with increased risk, often a sharply increased risk, of lung, lip, oral, larynx, esophagus and bladder cancer; of coronary heart disease and stroke, and of such lung problems as chronic bronchitis and emphysema. Petitioners further contend, more appropriate to this petition, that as non-smokers, *they are exposed to the same health hazards as smokers* by being compelled involuntarily to inhale tobacco smoke within the enclosed confines of the Louisiana Superdome.

The respondents filed a motion to dismiss the petitioners' complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure on the ground that the complaint, and amended complaints, failed to state any claim upon which relief can be granted. The Trial Court granted respondents' motion and dismissed petitioners' complaint. The Court of Appeal affirmed. Rehearing En Banc was denied. The Court of Appeal's ruling on constitutionality is contained in App. p. 3a, infra.

REASONS FOR GRANTING THE WRIT

1. In October Term, 1952, this Court decided *Pollak v. Utilities Commission of District of Columbia*, 89 U.S. App. D.C. 94, 191 F.2d 450 (1951), reversed 343 U.S.

451, 72 S.Ct. 813, 96 L. Ed. 1068 (1952), in which Capital Transit Co. (Capital) operated public streetcars and buses in the District of Columbia in accordance with congressional authority. The authorization came in the form of a Joint Resolution of Congress giving Capital the franchise to operate a local business of mass transportation in the District of Columbia area.

In 1948, Capital then entered into an agreement with Washington Transit Radio, Inc. (Transit Radio) wherein, Transit Radio agreed to install and maintain loudspeakers in all of the public vehicles owned by Capital and to provide broadcasting for at least eight hours each day. The programming broadcast included music, announcements and advertisements. Such announcements were transmitted irrespective of the wishes of the passengers. In order to sell advertising spots in these programs, Capital assured prospective buyers that their advertisements would reach a guaranteed audience.

Pollak and others brought suit alleging that they were being forced against their will, to listen to the broadcasts which were obnoxious. They further alleged that *"forced listening"* amounted to an infringement of their constitutionally protected rights and that they were being deprived of liberty without due process of law. The District Court granted the defendant's motion to dismiss the petition as not stating a claim upon which relief can be granted, but the United States Court of Appeal for the District of Columbia Circuit reversed, holding that forced listening on a public bus constituted an unwarranted violation and invasion of freedom in violation of the Fifth Amendment. This Court reversed the District of Columbia

Circuit, only because it found that the forced listening did not interfere with public safety, comfort and convenience.

In *Pollak*, supra, this Court implicitly indicated that the unreasonable "forced listening" of radio announcements, music and commercials on a public bus would have constituted an invasion of an individuals rights to privacy and liberty under the Fifth Amendment *had it been proven that such forced listening interfered with "the general public convenience, comfort and safety."* 343 U.S. at 464, 465, 72 S.Ct. at 882. Petitioners herein submit that if unreasonable forced listening has been held by this Honorable Court to be a violation of an individual's right to liberty and an invasion of his privacy, then, a fortiori, forced inhalation of poisonous gases and highly toxic fumes clearly constitute a violation of an individual's liberty and right of privacy contrary to the Fifth Amendment to the United States Constitution and contrary to the holding of this Court in *Pollak*.

2. In the prestigious *Columbia Journal of Environmental Law*, Vol. 3, No. 1, Fall, 1976, pp. 62 et seq., a comment appeared under the title *"Where There's Smoke There's Ire: The Search For Legal Paths To Tobacco-Free Air."* The author criticizes the District Court's attempt to distinguish *Pollak* from the case sub judice. The author was of the opinion that the contentions made by the petitioners herein have merit, Id. p. 78; that the attempts by the District Court to distinguish *Pollak* "are not convincing", Id. p. 79; and that the United States Supreme Court in *Pollak* implicitly acknowledged the right "to be free from forced listening", Id. p. 80.

In the equally prestigious *Environmental Affairs* published by the Boston College of Law, Vol. 6. No. 2 pp. 345, et seq., there is an article titled *"Legislation Against Smoking Pollution"*. In addition to referring to the *Columbia Journal of Environmental Law* criticism of the District Court's attempt to distinguish *Pollak* from this case, the author further stated:

> "One commentator [the author of Columbia Journal of Environmental Law] has criticized this portion of the *Gasper* Opinion as unresponsive to the plaintiff's meritorious contention that the right to be free from forced breathing of smoke filled air is analogous to the right to be free from forced listening to radio broadcasts which was recognized by the Supreme Court in the *Pollak* case, and that the important question in each case, is the reasonableness of the interference with each right." Id. p. 353.

3. In *Pred v. Board of Public Instruction of Dade City*, 415 F.2d 851 (C.A. 5th Cir., 1969) the very same Court of Appeals which affirmed the District Court's opinion in the case, sub judice, in a scathing comment on the Court below's dismissal of a new but serious question of constitutional law on barebone pleadings under Rule 12(b)(6) of the Federal Rules of Civil Procedure, stated as follows:

> "This is another monument to the needless waste of lawyer and Judge time and perhaps more important, client money. For now, fourteen months later, the case must go back to

> start the normal process of discovery leading to the production of facts or the demonstrated lack of them, on which, either before or after a conventional trial, the real merits of the case will be determined. This is but a different prelude to the common refrain on the high mortality rate to a dismissal under F.R.Civ.P. 12(b) for failure to state a claim. To the usual perils, should be added the unsoundness — both administratively and substantively of trying, in the orbital atmosphere of this dynamic era, to resolve new, but serious questions of constitutional law on barebone pleadings. Courts ought not to be pulled into academic exercises on a case that factually may never be. [citing cases]"

4. Under the test laid down by this Court in *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99 (1957) it must appear "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief," 78 S.Ct. at 102.

5. Petitioners urge this Court to grant a writ of certiorari because of the profound nature of the constitutional rights asserted by petitioners and the erroneous interpretation placed upon the Bill of Rights by the Courts below. The constitutional issues raised in this appeal are new, but are serious and of the highest magnitude. They concern the most basic and fundamental rights that any government can confer upon the governed — the right to life itself and the right of bodily integrity, liberty, the right of self preservation and the right to be free from injury. Without the fullest

protection of these rights, all other rights, privileges and immunities secured to the people by the Constitution become meaningless. This is a case of first impression. This Court writes on a clean slate. No other case, to our knowledge, has involved the issue of whether an individual has the constitutional right to be free from the involuntary inhalation of hazardous, disease-causing and life-threatening tobacco smoke in a public building owned and operated by the State. The decisions of the Courts below, if left to stand, will adversely affect the lives, safety and comfort of millions upon millions of people. It will have a profound adverse affect on preventive medicine, public health, safety and the general welfare of the people of this country.

6. Petitioners contend as non-smokers they enjoy the constitutional rights of life, liberty, the pursuit of happiness, to be let alone, to be free from injury and discomfort and to be free from being made involuntary smokers against their will, thus subjecting them to all of the known hazards of cigarette smoking. These rights are guaranteed and secured to them under the Bill of Rights to the United States Constitution and particularly the First, Ninth, and Fourteenth Amendments to the United States Constitution.

7. The Founding Fathers, in the Declaration of Independence, stated certain fundamental rights of the individual and enumerated personal liberties which are considered part of the natural law pursuant to John Locke's theories of natural law. These rights were considered so basic and established that there was no necessity of even mentioning them in the Con-

stitution itself. As was stated in the Declaration of Independence, these rights were deemed to be "self evident". The Declaration of Independence lists among these rights, the rights to "Life, Liberty, and the Pursuit of Happiness". The Declaration of Independence also lists and recognizes as a fundamental right the right of "Safety".

8. In the Preamble to the United States Constitution, it is pointed out that the Constitution was ordained and established to "promote the general welfare" among other things. There is therefore no doubt that among civilized nations and by reason of natural law the rights which are basic, fundamental and inherent to every member of civilized society are the rights of Life, Liberty, and the Pursuit of Happiness, Health and Safety.

9. The Bill of Rights, consisting of the first Ten Amendments to the United States Constitution, were proposed to the legislatures of the several states by the First Congress and were ratified in December of 1791 at which time they became law. The Bill of Rights contains within themselves a vast penumbra of rights, recognized by this Court and a long line of cases, which are not specifically enumerated in the United States Constitution. These are the rights which are considered "self-evident" as referred to in the Declaration of Independence. A number of these unenumerated rights are listed hereinabove. The Ninth Amendment to the United States Constitution provides:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or desparage others retained by the people."

It is respectfully submitted that under the Bill of Rights and the Fourteenth Amendment to the United States Constitution, non-smokers are vested with constitutional rights to be free from the forced and involuntary inhalation of dangerous tobacco smoke which endangers their health. They have the constitutional right in a public place, reasonably to be free from unnecessary injury; to be let alone; to pursue happiness without being exposed to tobacco smoke and the inhalation of the same. All of these rights are contained within the penumbra of natural rights that are self-evident and are secured to them as members of a civilized nation under the Constitution of the United States.

10. In one of the landmark cases of this Court, *Olmstead v. The United States*, 277 U.S. 438, 478 (1928), the question involved was one of whether wire tapping violated per se the Fourth Amendment to the Federal Constitution. The dissenting opinion of Justice Brandeis, considered one of the most famous dissenting opinions in the history of this Court, stated, in part, as follows:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to

be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions, their sensations. They conferred as against the Government, the right to be let alone — the most comprehensive of rights, the right most valued by civilized men."

Therefore, the right of privacy is clearly established as a fundamental right of man though not expressly enumerated as such in any provision of the Federal Constitution. It is also submitted that the right of life, means the right to a meaningful, healthy and happy life and is therefore a fundamental right of man firmly embedded in natural law and the Declaration of Independence which are part and parcel of the Bill of Rights and the United States Constitution.

11. Petitioners submit that the Ninth Amendment protects the right of self preservation, the right to be let alone, the right to be free from injury and many other important fundamental rights. While it may be difficult to isolate the critical factors which qualify rights as ones to be protected by the Ninth Amendment, the one factor which is proven to be extremely important is the historic significance of the rights. The right of Life, Liberty and pursuit of Happiness, enumerated in the Declaration of Independence, have this historical significance. There can be no doubt that the Declaration of Independence enumerates the right to life. This right implies the right not to be injured unnecessarily and the right to be let alone in one's person so as to be free and safe from discomfort. In the 186 year history of the United States Supreme Court, the

Ninth Amendment has drawn its deep consideration on perhaps three or four occasions, the most celebrated occasion being the case of *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965). However, in addition to *Griswold*, supra, this Court also rendered a far reaching decision in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705 (1973) in which this Court affirmed the District Court's Judgment declaring Texas Criminal Abortion Laws to be unconstitutional. Mr. Justice Blackmun, delivering the opinion of the majority of the Court, at p. 726, enumerated a number of constitutional rights which are not explicitly mentioned in the Constitution. These rights include, inter alia, the right of personal privacy or a guarantee of certain areas or zones of privacy, marriage, procreation, contraception, family relationships, child rearing and education. The roots of these rights have been found to exist under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution. Dean Roscoe Pound has stated that the Ninth Amendment to the Federal Constitution solomnly declares that:

> "Natural rights are not a fixed category of reasonable human expectations . . . laid down once and for all in the . . . Constitution. Those not expressly set forth are not to be excluded but are . . . left to be secured . . . by Constitutional change . . ." Pound, Introduction to Patterson, The Forgotten Ninth Amendment (1955).

12. In *Virginians for Dulles v. Volpe*, 344 F.Supp. 573, (D.C. VA. 1972) the Court indicated that had the plaintiffs presented a case of specific personal injury

causally related to noise, from the Washington National Airport, and could have shown a generalized injury to health and property from such noise, then *Fifth and Ninth Amendment rights would have been present*. The Court indicated that contained within the Ninth Amendment rights is the "*right to be free from injury*" Id. at p. 579.

13. In *Environmental Defense Fund v. Hoerner Waldorf*, D.C., Montana, 1970, 1 ERC. 1640, the Court noted that . . . "a person's health is what, in a most significant degree, sustains life," and the Court concluded . . . "*each of us is constitutionally protected in our natural and personal state of life and health.*"

14. The First Amendment protects "the right to receive information and ideas". *Stanley v. Georgia*, 394 U.S. 557, 80 S.Ct. 1243, 1247, (1969). The Superdome is not merely a sports palace. It is a multi-purpose facility that already has been used for religious conventions, circuses, and a multitude of non-sporting events. Attempts were made to obtain the D mocratic and Republican National Conventions and undoubtedly such a political convention will be secured in the future.

It has been held that First Amendment rights may not be burdened with arbitrary conditions; that such rights must remain unfettered and free from either inhabition, limitation or prohibition. *Lamont v. Postmaster General of the United States*, 381 U.S. 301, 85 S.Ct. 1493 (1965).

In *Lamont*, supra, a section of the Postal Service and Federal Employees Salary Act of 1962 was declared unconstitutional. The provisions in question required any mail coming from a foreign country determined by the Secretary of the Treasury to be "Communist political propaganda" to be detained by the Post Master General. The addressee was then informed of its receipt and in order to receive the same had to request in writing that the mail be delivered to him. The plaintiff, Dr. Lamont, refused to sign the request and challenged the constitutionality of the law on the ground that the requirement that he request the receipt of such mail in writing placed an impermissible burden or abridgement on his First Amendment Rights. This Court declared the law unconstitutional and stated:

> "We conclude that the Act as construed and applied is unconstitutional because it required an official act (viz., returning the reply card) as a limitation on the unfettered exercise of the addressee's First Amendment Rights." Id. at U.S. 1495.

In *Lamont*, supra, this Court further stated:

> "We rest on the narrow ground that the addressee in order to receive his mail, must request in writing that it be delivered. This amounts in our judgment to an unconstitutional abridgement of the addressee's First Amendment Rights." Id. at U.S. 1496.

To paraphrase this Court in *Lamont*, supra, petitioners submit that "the plaintiffs, in order to receive information and ideas in the Superdome, must subject themselves to the forced inhalation of tobacco smoke. This amounts to an unconstitutional abridgement of their First Amendment Rights." The constitutional principle of law announced by this Court in *Lamont* is that the right to information and ideas, protected under the First Amendment, may not be fettered, limited, prohibited or inhibited by arbitrary or unreasonable governmental actions or conditions. Thus, the precondition placed upon non-smokers attending the Superdome to receive information and ideas that they subject themselves to the forced inhalation of hazardous tobacco smoke is a violation of their First Amendment Rights, under *Lamont*, supra.

CONCLUSION

For the reasons stated above, this Petition for Certiorari should be granted.

Respectfully submitted,

JACOB J. MEYER
Tenth Floor Suite
321 St. Charles Avenue
New Orleans, Louisiana 70130
Telephone: (504) 586-1979
Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify this ____ day of _____, 1978 that I have served copies of the foregoing petition for a Writ of Certiorari, and the attached Appendix, upon the Honorable William J. Guste, Jr., Attorney General of Louisiana through Kendall L. Vick, the Assistant Attorney General of Louisiana at the Department of Justice, State of Louisiana, 7th Floor, 234 Loyola Building, New Orleans, Louisiana 70112, and upon Harry McCall, Jr., Special Counsel for the Attorney General of Louisiana at 1500 First National Bank of Commerce Building, New Orleans, Louisiana 70112, by mailing same, postage prepaid addressed to them at their respective offices.

_____

JACOB J. MEYER

APPENDIX "A"

Kenneth O. GASPER et al.,
Plaintiffs-Appellants,

versus

LOUISIANA STADIUM AND EXPOSITION DISTRICT et al.,
Defendants-Appellees,

American Lung Association of Louisiana,
Intervenor.

No. 76-3748.

United States Court of Appeals,
Fifth Circuit.

Aug. 1, 1978.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before COLEMAN, AINSWORTH and VANCE, Circuit Judges.

PER CURIAM:

This was an action brought pursuant to the provisions of 42 U.S.C., § 1983[1] to enjoin the Louisiana

1 "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." 42 U.S.C., § 1983.

Stadium and Exposition District from continuing to allow tobacco-smoking in the New Orleans Superdome during events staged therein. Pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure and without reaching or deciding the "state action" aspect of the case, the District Court dismissed the complaint for failure to state claims upon which relief could be granted, "in that nothing in the United States Constitution grants unto plaintiffs the rights they claim to have been violated", *Gasper v. Louisiana Stadium and Exposition District*, 418 F.Supp. 716 (E.D.La., 1976). We affirm.

The reported opinion clearly indicates that the District Court was well aware of the limitations applicable to dismissals under Rule 12(b)(6). The invitation to reverse on the ground that the Court did not adequately comprehend the function of a Rule 12(b)(6) dismissal is declined, see 418 F.Supp. at 717.

The plaintiffs prayed that those in charge of the Superdome and its operations should be enjoined "from in any way permitting smoking and the sale of tobacco products in the Superdome during the staging therein of public events".

What it all comes down to is that the plaintiffs claim a *constitutional right* to stop other individuals from smoking in the Superdome while a performance is in progress.

We assume that the Superdome authorities, if they saw fit, could prohibit smoking in the facility, or the City of New Orleans in the exercise of its police power

could prohibit smoking in public stadiums, or the State of Louisiana could enact a similar statute of statewide application. No such rule, city ordinance, or state statute has been enacted.

We assume that Congress might prohibit the interstate transportation of cigarettes or otherwise restrict tobacco in interstate commerce. Congress has not seen fit to do so.

The plaintiffs would have us to fill this great void by elevating to constitutional dimensions their opposition to the presence of tobacco smoke at football games or like performances in public stadiums. Obviously, if one may constitutionally enforce opposition to smoking in one public place he may, as a constitutional right, have it imposed at another.

We are not unaware of what happened when, by express constitutional amendment and congressional enactment, an effort was made to prohibit alcohol for beverage purposes, something fully as physically harmful as tobacco smoke, if not more so.

Since we can see no constitutional basis for injecting the courts and their injunctive powers into this tobacco-smoke controversy, we are of the opinion that the District Court was quite correct in dismissing the complaint. The dismissal is

AFFIRMED.

AINSWORTH, Circuit Judge, dissenting:

I believe the district judge committed reversible error in granting the motion to dismiss the present suit on the basis of the barebone pleadings of plaintiffs, without granting a trial on the allegations of the complaint as amended. I would accordingly require a trial of the merits of the case and remand the matter with directions to the district judge to proceed expeditiously, receive evidence from the witnesses, and give full consideration to the issues involved. For that reason, I respectfully dissent from the majority per curiam opinion.

In this class action brought under the Civil Rights Act (42 U.S.C. § 1983), plaintiffs allege deprivation of their rights under the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, in that the Louisiana state agency defendants in charge of the operation of the Superdome, an enclosed indoor stadium and public building in New Orleans, permit smoking therein during the staging of public events. Plaintiffs seek injunctive relief against the defendants on the allegations of their complaint, the key provisions of which read as follows:

"7.

"Plaintiffs are non-smokers. On the occasions when they attend events in the Superdome as paid invitees, they suffer great physical, mental and emotional distress, illness and discomfort which impairs their health, safety and ability to enjoy said events as a direct result of noxious, ill-smelling and

harmful smoke and fumes generated, discharged and trapped in the air of the Superdome by those patrons who smoke cigarettes, and other tobacco substances.

"8.

"Notwithstanding requests from numerous patrons and medical authorities, the defendant has failed and refused to prohibit smoking in the Superdome, having knowledge that smoking interferes with the health, safety and ability of the plaintiffs and all non-smoking patrons to enjoy the events for which they paid the price of admission to witness in safety and free from unnecessary exposure to the serious health hazards created by smoking in the Superdome.

"9.

"The Surgeon General of the United States has determined, and scientific investigation has confirmed, that smoking is dangerous to the health of the smoker himself and the non-smoker who becomes subject to the inhalation of the sidestream and mainstream smoke emitted by burning tobacco.

"10.

"The defendant's wanton disregard for the health, safety and comfort of plaintiffs and all other non-smoking patrons of the Superdome has caused, and will continue to cause, plaintiffs to be unwilling, passive and involuntary

smokers by proximity, thereby subjecting them to loss of health, comfort and ability to enjoy the events at the Superdome for which they paid the price of admission to witness.

"11.

"Smoking in the Superdome interferes with plaintiffs' rights of self-preservation; to be let alone, to be free from injury; and to be free from exposure to and involuntary consumption of hazardous smoke fumes, all of which rights, privileges and immunities are guaranteed and secured to them by the Fifth, Ninth and Fourteenth Amendments to the United States Constitution."

In the request for oral argument in their brief to this Court, plaintiffs state:

"The Constitutional issues raised in this appeal are of the highest magnitude. They concern the most basic and fundamental rights that any government can confer upon the governed — the right to life itself, the right of bodily integrity; the right to be let alone, the right of self-preservation; the right to be free from injury.

"Without the fullest protection of these rights, all other rights, privileges and immunities secured to the people by the Constitution become meaningless."

In the statement of the case in their brief they say:

"Plaintiffs contend that under the Constitutional Amendments cited above, they have the right to be let alone; the right of privacy; the right to be free from the unnecessary exposure to life-threatening and disease-causing gases and fumes in a public facility; the right to be free from injury in a public facility; the right to receive information and ideas in a public facility unfettered by the dangerous pre-condition that they inhale tobacco smoke against their will; the right of bodily integrity."

In considering a motion to dismiss under Rule 12(b)(6), Federal Rules of Civil Procedure, the well-pleaded allegations of facts must be accepted as true. *Mannings v. Board of Public Instruction of Hillsborough County, Florida*, 5 Cir., 1960, 277 F.2d 370, 372. Also, most pertinent hereto is the principle of law established by the Supreme Court in the leading case of *Conley v. Gibson*, 355 U.S. 41, 45, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957), as follows:

"In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim *unless it appears beyond doubt* that the plaintiff can prove no set of facts in support of his claim which entitle him to relief." (emphasis supplied)

This Court has made it clear that a motion to dismiss for failure to state a claim is viewed with disfavor and

is rarely granted, *Madison v. Purdy*, 5 Cir., 1969, 410 F.2d 99, 100, and that "[d]ismissal of a claim on the basis of barebone pleadings is a precarious disposition with a high mortality rate." *International Erectors, Inc. v. Wilhoit Steel Erectors and Rental Serv.*, 5 Cir., 1968, 400 F.2d 465, 471; *Barber v. Motor Vessel "Blue Cat,"* 5 Cir., 1967, 372 F.2d 626, 627.

In their brief plaintiffs state:

> "Plaintiffs contend that the tobacco smoke they are forced to inhale causes them physical injury, and discomfort and further subjects them to the same health hazards to which smokers themselves are subjected, namely, cancer, heart disease, stroke, emphysema, chronic bronchitis (all life-threatening illnesses), as well as a myriad of other ailments, discomforts and impairment of normal bodily functions. Plaintiffs have marshaled scientific evidence to support their claims and will be prepared to make such evidence a matter of judicial record on the trial of the merits of this case; and the defendants will have the opportunity to rebutt [sic] such evidence if they can."

The allegations in plaintiffs' pleadings and the contentions which they assert must be measured as to a motion to dismiss against the test which the Supreme Court has established in *Goosby v. Oser*, 409 U.S. 512, 518, 93 S.Ct. 854, 858-59, 35 L.Ed.2d 36 (1973), as follows:

> " 'Constitutional insubstantiality' for this purpose has been equated with such concepts

> as '*essentially fictitious*,' *Bailey v. Patterson*, 369 U.S. [31] at 33, 82 S.Ct. [549] at 551 [7 L.Ed.2d 512] '*wholly insubstantial*,' ibid; '*obviously frivolous*,' *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288, 30 S.Ct. 326, 327, 54 L.Ed. 482 (1910); and 'obviously without merit,' *Ex parte Poresky*, 290 U.S. 30, 32, 54 S.Ct. 3, 4-5, 78 L.Ed. 152 (1933). The limiting words 'wholly' and 'obviously' have cogent legal significance. In the context of the effect of prior decisions upon the substantiality of constitutional claims, those words import that *claims are constitutionally insubstantial only if the prior decisions inescapably render the claims frivolous;* previous decisions that merely render claims of doubtful or questionable merit do not render them insubstantial for the purposes of 28 U.S.C. § 2281. *A claim is insubstantial only if* ' *"its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy."* ' "(emphasis added)

Since I do not believe that on the state of this record, looking only to plaintiffs' pleadings, and without having a trial on the merits, that "it appears beyond doubt" that plaintiffs can prove no set of facts to support their claim, or that the constitutional allegations are "essentially fictitious," "wholly insubstantial," or "obviously frivolous," I would give the plaintiffs the opportunity to show what they can in support of their allegations and contentions. Dismissal of the suit at this stage was therefore erroneous.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK

September 14, 1978

Edward W. Wadsworth
Clerk

TO ALL PARTIES LISTED BELOW:

NO. 76-3748 — KENNETH O. GASPER, Et Al, v. LA. STADIUM & EXPOSITION DISTRICT, Et Al, AMERICAN LUNG ASSOCIATION OF LA.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing on behalf of Kenneth O. Gasper, Et Al., and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
/s/ BRENDA M. HAUCK
Deputy Clerk

cc: Mr. Jacob J. Meyer
Messrs. Harry McCall, Jr.
James P. Farwell
Messrs. Kendall L. Vick
Barbara S. Bruckner
Mr. J. Harrison Henderson, III

APPENDIX "C"

Kenneth O. GASPER et al.,

versus

LOUISIANA STADIUM AND
EXPOSITION DISTRICT et al.

Civ. A. No. 75-3732.

United States District Court,
E. D. Louisiana.

Sept. 8, 1976.

JACK M. GORDON, District Judge.

This action is brought pursuant to the provisions of 42 U.S.C., § 1983, and 28 U.S.C., § 1343, in an attempt by

the named plaintiffs to enjoin the Louisiana Stadium and Exposition District from continuing to allow tobacco-smoking in the Louisiana Superdome during events staged therein. The Louisiana Superdome is an enclosed arena located in New Orleans, Louisiana, owned and maintained by a political subdivision of the State of Louisiana known as the Louisiana Stadium and Exposition District (hereinafter referred to as "LSED"). The building is a public, multipurpose facility, and, since its completion, has been used for many events ranging from concerts to Mardi Gras parades.

The plaintiffs, Kenneth O. Gasper, Allen C. Gasper, Beverly Guhl, Dorothy L. Smira, Edward Smira, Albert E. Patent, and David A. Patent, individually and as representatives of other nonsmokers who have attended, or who will attend, such functions in the Louisiana Superdome, challenge LSED's permissive attitude toward smoking as being constitutionally violative of their right to breathe smoke-free air while in a State building. In support of their complaint, the plaintiffs aver that by allowing patrons to smoke in the Louisiana Superdome, LSED is causing other nonsmokers involuntarily to consume hazardous tobacco smoke, thereby causing physical harm and discomfort to those nonsmokers, as well as interfering with their enjoyment of events for which they have paid the price of admission, all in violation of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

The defendants have filed a motion to dismiss the complaint pursuant to Rule 12(b)(6), Federal Rules of

Civil Procedure, contending the plaintiffs have failed to state claims upon which relief can be granted, in that nothing in the United States Constitution grants unto plaintiffs the rights they claim to have been violated.

In considering the merits of a Rule 12(b)(6) motion to dismiss, the Court must view the complaint in the light most favorable to the complainants and must regard all alleged facts as true. *Hargrave v. McKinney*, 413 F.2d 320 (5th Cir. 1969), vacated on other grounds, *Askew v. Hargrave*, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971). Hence, although plaintiffs contend that a motion to dismiss is inappropriate, this Court, is of the opinion that the Constitutional issues raised could never be more squarely presented than in the motion to dismiss now before the Court.

The plaintiffs have brought this action pursuant to Title 42, § 1983, of the United States Code. That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

There are two essential elements of a cause of action under § 1983. First, the conduct complained of must have been done by some person acting under color of state law and, second, such conduct must have deprived the plaintiff of rights, privileges or immunities secured by the Constitution and laws of the United States. *Adickes v. S. H. Kress and Company*, 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970); *Beaumont v. Morgan*, 427 F.2d 667 (1st Cir. 1970); *Needleman v. Bohlen*, 386 F.Supp. 741 (D.Mass.1974). The absence of either of these elements is fatal to a cause of action under 42 U.S.C., § 1983, and it is the defendants' position that neither element exists in this lawsuit. By way of response, the plaintiffs contend that state action is established by the State's permitting smoking in the Superdome and by the selling of tobacco products, therein, and further alleges that such state action violates the First, Fifth, Ninth and Fourteenth Amendments to the Constitution. This Court does not believe that it is necessary to decide whether the complained-of conduct is or is not state action as required by § 1983, since the Court is of the opinion that there clearly has been no violation of plaintiffs' constitutional rights. Each of the alleged violations will now be considered.

First Amendment

Just as the First Amendment protects against the making of any law which would abridge the freedom of speech or of the press, it also protects against any law or activity which would interfere with or contract the concomitant rights to receive those thoughts disseminated under the protection of the First Amend-

ment. As the Court in *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) said, "Without those peripheral rights the specific rights would be less secure." *See* also, *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243, 22 L.Ed.2d 542 (1969).

It is this peripheral right to receive others' thoughts and ideas that the plaintiffs herein contend is being subverted by the State's condoning tobacco-smoking in the Louisiana Superdome. The nonsmokers argue that the existence of tobacco smoke in the Superdome creates a chilling effect upon the exercise of their First Amendment rights, since they must breathe that harmful smoke as a precondition to enjoying events in the Superdome. In support of this rather unique argument, the nonsmokers cite *Lamont v. Postmaster General of United States*, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965). In *Lamont*, the plaintiff was the subject of a rule imposed by the Postmaster requiring a written statement evidencing the undersigned's desire to receive communist propaganda literature. In the absence of this written request, the literature, although properly addressed, would not be delivered. The United States Supreme Court held that this was an unconstitutional infringement on the recipient's First Amendment rights, citing several other cases where licensing and taxing had been employed by federal agencies to regulate the flow of information. The Court reasoned:

> "Just as the licensing or taxing authorities in the Lovell, Thomas, and Murdock cases sought to control the flow of ideas to the public, so here federal agencies regulate the flow of mail." (*Lamont, supra*, at 1496.)

The Court in *Lamont* was understandably concerned with the apparent attempts of the Postmaster General to either identify or harass those individuals who wished to receive communist propaganda through the mail. The laudable purpose of the *Lamont* decision was to prohibit unfettered regulation of the free exchange of information and ideas. Unlike the *Lamont* case, the instant case contains no facts even remotely indicating an attempt by the State of Louisiana to restrict anyone's right to receive information or entertainment. Other than making periodic requests that patrons of the Louisiana Superdome voluntarily refrain from smoking, the State has adhered to the tenet of not interfering with the manner in which spectators watch events for which they have paid.

To say that allowing smoking in the Louisiana Superdome creates a chilling effect upon the exercise of one's First Amendment rights has no more merit than an argument alleging that admission fees charged at such events have a chilling effect upon the exercise of such rights, or that the selling of beer violates First Amendment rights of those who refuse to attend events where alcoholic beverages are sold. This Court is of the opinion that the State's permissive attitude toward smoking in the Louisiana Superdome adequately preserves the delicate balance of individual rights without yielding to the temptation to intervene in purely private affairs. Hence, this Court finds no violation of the First Amendment to the United States Constitution.

Due Process of Law

In further support of his argument that the State is violating Title 42, § 1983 of the United States Code, the plaintiffs cite the Fifth and Fourteenth Amendments to the Constitution, alleging that the State of Louisiana is unlawfully depriving those non-smoking patrons of the Louisiana Superdome of their life, liberty and property without due process of law. The plaintiffs contend that the penumbral protection of the Fifth and Fourteenth Amendments includes the right to be free from hazardous tobacco smoke while in State buildings, and cite *Pollak v. Public Utilities Commission of District of Columbia*, 89 U.S.App.D.C. 94, 191 F.2d 450 (1951), reversed, 343 U.S. 451, 72 S.Ct. 813, 96 L.Ed. 1068 (1952), as authority for such an argument. In *Pollak*, the Capital Transit Co. (Capital) operated streetcars and buses in the District of Columbia pursuant to Congressional authorization. Such authorization came in the form of a Joint Resolution of Congress, giving Capital not only a franchise, but a virtual monopoly of the entire local business of mass transportation in the District of Columbia area.[1]

In 1948, Capital entered into a contract with Washington Transit Radio, Inc. (Transit Radio), wherein Transit Radio agreed to install and maintain loudspeakers in all vehicles owned by Capital and to provide broadcasting for at least eight hours each day. The programming of such broadcasts included music, announcements and advertisements and would be transmitted irrespective of the wishes of passengers.

1 Act of March 4, 1925, 43 Stat. 1265; Joint Resolution of Jan. 14, 1933, 47 Stat. 752.

To sell advertising spots in these programs, Capital would assure prospective buyers that their advertisements would reach a guaranteed or captive audience since Capital knew that most commuters were compelled to begin or complete their trips into or out of the District of Columbia by using buses or streetcars owned by Capital.

The plaintiffs brought suit alleging that because they were obliged to use the buses and streetcars of Capital in connection with the practice of their profession, they were being forced to listen to the allegedly obnoxious broadcasts against their will. They further alleged that this "forced listening" amounted to an infringement of their constitutionally protected rights in that they were being deprived of liberty without due process of law. The District Court granted the defendant's motion to dismiss the petition as not stating a claim upon which relief could be granted, and the case was appealed. The United States Court of Appeals, District of Columbia Circuit, reversed, holding that the broadcasts were in violation of the Fifth Amendment. The Supreme Court, finding no such violation, reversed and remanded the case back to the District Court.

The plaintiffs in the case now before this Court rely primarily upon the Circuit Court's opinion in *Pollak*, stating in memorandum that the case was reversed by the United States Supreme Court on grounds other than those for which they now cite the Circuit Court opinion. This Court cannot agree with the plaintiffs' argument.

In a section of its opinion entitled "No violation of the Fifth Amendment," the Supreme Court recognized, but did not agree with, the Circuit Court's conclusion that if one passenger objects to the programming in question as an invasion of his constitutional right of privacy, the use of radio broadcasting on those public vehicles must be discontinued. The Court said:

> "This position wrongly assumes that the Fifth Amendment secures to each passenger on a public vehicle regulated by the Federal Government a right of privacy substantially equal to the privacy to which he is entitled in his own home. *However complete his right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance.* Streetcars and buses are subject to the immediate control of their owner and operator and by virtue of their dedication to public service, they are for the common use of all of their passengers. The Federal Government in its regulation of them is not only entitled, but is required to take into consideration the interests of all concerned.
>
> * * * *
>
> "The liberty of each individual in a public vehicle or public place is *subject to reasonable limitations in relation to the rights of others.*" *Public Utilities Commission v. Pollak, supra,* 343 U.S. at 464, 465, 72 S.Ct. at 821, 822. (Emphasis added.)

Even if this Court were to consider only the Circuit Court's opinion in *Pollak*, there are material factors in that case which distinguish it from the case presently at bar. First, the Circuit Court did not have occasion to weigh or balance an individual's "right" to bring a radio on the bus or streetcar for his own pleasure against the "right" of others to remain in silence. To the extent the Circuit Court found in favor of those who wished to remain free of forced listening, as opposed to those who wished to listen to the broadcasts provided by Transit Radio, the Court was specifically reversed. The question remains whether the Circuit Court's decision in *Pollak* would have been the same if a private citizen, rather than the transit company itself, had been permitted to bring and play a radio on the bus or streetcar. This latter factual situation would be analogous to that before this Court, as opposed to that which the Circuit Court had before it in *Pollak*.

More important, however, is the fact that the passengers in *Pollak*, unlike the spectators in this case, were "a captive audience." Put another way, those commuters in *Pollak* were forced to listen to the broadcasts in question because they were forced to ride the transit system. There was no other alternative to taking the bus or streetcar. In fact, because Capital was the only transit company authorized by Congress to operate in the District of Columbia, it had a virtual monopoly of the entire local business of mass transportation.

The gravamen of the Circuit Court's opinion in *Pollak* was the fact that the Capital Transit Company was bombarding passengers with sound they could not ignore in a place where they had to be.

This case differs greatly from the scenario in *Pollak* since those who attend events in the Louisiana Superdome are in no way compelled to use the facility. On the contrary, they are free to attend or not attend as they see fit, and consequently the most important premise upon which the *Pollak* decision rests is absence in the case *sub judice*.

This Court is of the further opinion that the process of weighing one individual's right to be left alone, as opposed to other individuals' alleged rights under the Fifth and Fourteenth Amendments, is better left to the processes of the legislative branches of Government. For this reason, the rationale of *Tanner v. Armco Steel Corporation*, 340 F.Supp. 532 (S.D.Tex.1972) is more persuasive to this Court. In *Tanner*, the plaintiffs brought suit to recover for injuries allegedly sustained as a result of the exposure of their persons to air pollutants emitted by defendant's petroleum refineries and plants located along the Houston Ship Channel. As in the instant case, the plaintiffs in *Tanner* cited a potpourri of federal constitutional and statutory provisions to establish jurisdiction. The Court found both "state action" and "constitutional deprivation" lacking.

After the Court acknowledged a recent boom of claims asserting the right of the general populace to enjoy a decent environment, it explained,

> "... the judicial process, through constitutional litigation, is peculiarly ill-suited to solving problems of environmental control. Because such problems frequently call for the

delicate balancing of competing social interests, as well as the application of specialized expertise, it would appear that their resolution is best consigned initially to the legislative and administrative processes. Furthermore, the inevitable trade-off between economic and ecological values presents a subject matter which is inherently political, and which is far too serious to relegate to the ad hoc process of 'government by lawsuit' in the midst of a statutory vacuum.

* * * *

"[N]o legally enforceable right to a healthful environment, giving rise to an action for damages, is guaranteed by the Fourteenth Amendment or any other provision of the Federal Constitution." *Tanner v. Armco Steel Corp., supra*, 340 F.Supp. at pp. 536, 537.

Accord, *Hagedorn v. Union Carbide Corp.*, 363 F.Supp. 1061 (N.D.W.Va.1973); (holding that plaintiff's allegations that emissions from Union Carbide Corporation's plant in West Virginia were fouling the air did not present a controversy arising under the Fifth, Ninth or Fourteenth Amendments to the Constitution); *see* also, *Doak v. City of Claxton, Georgia*, 390 F.Supp. 753 (S.D.Ga.1975).

This language accurately reflects the fact that the courts have never seriously considered the right to a clean environment to be constitutionally protected under the Fifth and Fourteenth Amendments. It is well established that the Constitution does not provide judicial remedies for every social and economic ill.

Lindsey v. Normet, 405 U.S. 56, 92 S.Ct. 862, 31 L.Ed.2d 36 (1972). Accordingly, if this Court were to recognize that the Fifth and Fourteenth Amendments provide the judicial means to prohibit smoking, it would be creating a legal avenue, heretofore unavailable, through which an individual could attempt to regulate the social habits of his neighbor. This Court is not prepared to accept the proposition that life-tenured members of the federal judiciary should engage in such basic adjustments of individual behavior and liberties.

Fundamental Rights

Citing the Ninth Amendment to the United States Constitution and *Griswold v. State of Connecticut*, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965), the plaintiffs finally argue that the right to breathe clean air is a fundamental right, although not specifically enumerated in the Bill of Rights, and is thus protected by the Constitution. The Ninth Amendment reads,

"The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people." U.S.C.A.Const. Amend. 9.

The Ninth Amendment renaissance began with *Griswold v. State of Connecticut, supra*, wherein the Court recognized that the right of privacy in a marital relationship is a fundamental right protected by the Constitution. The plaintiffs herein contend that the right to be free from hazardous smoke fumes caused by the smoking of tobacco is as fundamental as the

right of privacy recognized in the *Griswold* decision. This Court does not agree. To hold that the First, Fifth, Ninth or Fourteenth Amendments recognize as fundamental the right to be free from cigaret smoke would be to mock the lofty purposes of such amendments and broaden their penumbral protections to unheard-of boundaries. The jurisprudence bears this out. In *Ely v. Velde*, 451 F.2d 1130 (4th Cir. 1971), the Court considered a suit brought by residents of the Green Springs area of Louisa County, Virginia, to halt the proposed funding and construction in their neighborhood of a Medical and Reception Center for Virginia prisoners. With regard to the § 1983 action against the State Director of the Department of Welfare and Institutions for the State of Virginia, the Court said,

> "An ancillary argument of the complaining parties, not vigorously pressed, is that apart from NHPA and NEPA, the federal Constitution was violated by Brown's 'unreasonable and arbitrary action' in placing the proposed Center in Green Springs. We decline the invitation to elevate to a constitutional level the concerns voiced by the appellants. While a growing number of commentators argue in support of a constitutional protection for the environment, this newly-advanced constitutional doctrine has not yet been accorded judicial sanction; and appellants do not present a convincing case for doing so.
>
> "Appellants baldly attempt to stretch rights, protected by law against infringement

> by federal agencies only, to cover the states and their officers in disregard of the plainly limited character of the legislation. They make their assertion without citation of a single relevant authority and with no attempt to develop supporting reasons. The general concept of conservation and protection of the environment has, in the recent past, made vast advances, prompting the adoption of NHPA, NEPA and other legislation. But without any showing whatever, we are not free to lay upon the State of Virginia new obligations on constitutional grounds.
>
> "Neither the statutes nor the Constitution confers rights on the appellants which are enforceable *vis-a-vis* the State of Virginia under 42 U.S.C. § 1983." *Ely v. Velde, supra*, at 1139.

Accord, *Hagedorn v. Union Carbide Corp.*, 363 F.Supp. 1061 (N.D.W.Va.1973); *see also, Doak v. City of Claxton, Ga.*, 390 F.Supp. 753 (S.D.Ga.1975).

In another case, *Environmental Defense Fund, Inc. v. Corps of Eng. of U. S. Army*, 325 F.Supp. 728 (E.D.Ark.1970), the plaintiff filed suit against the Corps of Engineers of the U. S. Army and others, seeking to enjoin the making of any contract or the doing of any work in furtherance of the plan of the defendants to construct a dam across the Cossatat River in Arkansas. Although denying on other grounds several motions to dismiss filed by the defendant, the Court explained,

> "The Ninth Amendment may well be as important in the development of constitutional law during the remainder of this century as the Fourteenth Amendment has been since the beginning of the century. But the Court concludes that the plaintiffs have not stated facts which would under the present state of the law constitute a violation of their constitutional rights as alleged in the seventh cause of action in their complaint. The Court's decision on this point gives further emphasis to its statement, supra, that final decisions in matters of this type must rest with the legislative and executive branches of government." *Environmental Defense Fund, Inc. v. Corps of Eng. of U. S. Army, supra*, at 739.

This Court feels that, unlike the right of privacy as it relates to the institution of marriage, the "right" to breathe smoke-free air while attending events in the Louisiana Superdome certainly does not rise to those constitutional proportions envisioned in *Griswold v. State of Connecticut*. To hold otherwise would be to invite government by the judiciary in the regulation of every conceivable ill or so-called "right" in our litigious-minded society. The inevitable result would be that type of tyranny from which our founding fathers sought to protect the people by adopting the first ten amendments to the Constitution.

Conclusion

Pretermitting the issue of state involvement, this Court is satisfied that the plaintiffs herein have failed

to allege a deprivation of any right secured by the United States Constitution and, hence, have failed to state a claim upon which relief could be granted under 42 U.S.C. § 1983. It is worth repeating that the United States Constitution does not provide judicial remedies for every social and economic ill. For the Constitution to be read to protect nonsmokers from inhaling tobacco smoke would be to broaden the rights of the Constitution to limits heretofore unheard of, and to engage in that type of adjustment of individual liberties better left to the people acting through legislative processes.

Since this Court has concluded that the plaintiffs have asserted no claim to sustain federal jurisdiction, there can be no jurisdiction in this Court for the alleged "pendent" state claims asserted in the complaint by plaintiffs. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

Accordingly,

IT IS ORDERED that the defendants' motion to dismiss the plaintiffs' complaint be and is hereby GRANTED.